HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 2049 of 2001
(Old No. 191 of 1990)

Lal Bachan …….. Appellant

Vs.

State of Uttaranchal ……..Respondent

Sri Nand Gopal Singh learned counsel for the appellant.
Sri A. Rab learned Addl. G.A.

Dated :- 31st July, 2004

Per Coram :- **Hon'ble Irshad Hussain, J.**
Hon'ble J. C. S. Rawat, J.

This is a criminal appeal under Section 374 of the Code of Criminal Procedure (for short 'Code') against the judgment and order dated 30.1.1990 passed by the Ist Addl. Sessions Judge, Nainital in S.T. No. 83/1987 convicting and sentencing the appellant-Lal Bachan to undergo RI for life imprisonment under section 302/34 IPC. However, by the said judgment and order the other accused persons Ram Avtar and Darbari were found not guilty under sections 302/34 & 201 IPC and they were acquitted.

2. The brief facts giving rise to the present appeal are that on 11.10.1986 Pares Nath Pandey (PW-3) filed a written report (Ex.ka.4) at P.S. Rudrapur and the entry to this effect was made in the G.D. (Ex.ka.3). He stated therein that his father Raghubans Pandey (deceased) used to look after the property in Districts Nainital and Ballia. When his father did not return to Ballia from Bhagwanpur, District Nainital he came to Bhagwanpur on 10.10.1986. On enquiry being made from Prabhu Nath Chaudhari (PW-1) it was learnt that the deceased told him about the plan to visit Ballia but thereafter he was not seen. It was also disclosed that there was litigation between his father and the appellant-Lal Bachan and his associates Ram Avtar and Darbari. The I.O. Sri S.P. Singh (PW-5) started the investigation after registration of the case. On 18.10.1986 at

about 10 AM, the police arrested appellant-Lal Bachan, Ram Avtar, Darbari and Mithoo and on their pointing out one human skeleton was recovered from the sugarcane field of Khanna Farm of Pant Nagar University. S.I. S.P. Singh (PW-5) I.O. recovered the pieces of Chadar (Ex.2), pieces of Dhoti (Ex.3), Tabij (Ex.4) and Chappal (Ex.5). He also took the samples of plain and blood stained and sealed under the recovery memo Ex.ka.2. The I.O. got the photograph of the skeleton and prepared the site plan where the deceased used to live (Ex.ka.5), site plan of the place of recovery of dead body (Ex.ka.6). He also prepared inquest report (Ex.ka.9), sketch map of dead body (Ex.ka.10), challan of dead body (Ex.ka.11) and recovery memos of skeleton (Ex.ka.12 & Ka. 13). Constable Dhanpal Singh and Home Guard Tara Chand sent the skeleton for postmortem examination.

3. The charges under section 302/34 & 201 IPC were framed by the learned Ist Additional Sessions Judge against the appellant. The appellant denied the charges and claimed the trial. The investigation was taken up as usual which culminated into the submission of the charegesheet against the appellant and others.

4. In order to prove its case, the prosecution examined five witnesses. Raghunath Chaudhari (PW-1) narrated the prosecution case as stated in the written report (Ex.ka.4). Ravindra Nath Jha (PW-2) is the witness of extra judicial confession of the appellant-Lal Bachan. He gave evidence in this regard. Paras Nath Pandey (PW-3), the son of the deceased, stated that on enquiry from Raghunath Chaudhari (PW-2) it was disclosed that his father was missing since 11/12.9.1986. It was also disclosed that there was litigation between his father and the accused namely, Lal Bachan, Ram Avtar and Darbari. Mohd. Tahir (PW-4) posted as Head Constable at P.S. Rudrapur proved the entry of registration of case made in the G.D. on the basis of the written report. S.I. Sri S.P. Singh (PW-5) posted at P.S. Rudrapur was the Investigating Officer of the case. The case was registered in his presence at the police station and he started the investigation immediately after registration of the case.

5. The Medical Officer, Civil Hospital conducted the postmortem of the dead body (skeleton) of the deceased on 19.10.1986. The Medical Officer stated that the deceased was aged about 50 years. He further stated that skeleton consisted of bones only and there were no tissues of flash on the dead body. The following observations were recorded in the postmortem report:-

(i) Skull – It was intact. No cut or fractures seen in it. The shape and bony prominences of the skull appears to be of a male person. No teeth sockets present.

(ii) Lower jaw – Found out detached from skull only (R) last molar tooth was attached to it. Five teeth sockets were present but empty. The other portion of the alveolar border was seen degenerated and flat.

(iii) Left scapula bone found separate with its meanal border grawed through and incomplete.

(iv) Right humerus round separately.

(v) Right radius and right ulna bones were found attached together with ligaments and interosseous membrance. The lower ends of both were irregularly worn off midly.

(vi) Left humerus bone attached to left radius and left ulna found together. Attachment was by ligaments. The lower part of the left ulna and left radius appeared to be through.

(vii) Right femur found separate.

(viii) Right Tibia and right fibula bones attached together at both ends by ligamik.

(ix) Left femur found separately.

(x) Left Tibia and left fibula found attached together at both ends by means of ligaments.

The lower ends of the Tibia and Fibula of both lower limbs were found irregularly. Destructed as gramid out in appearance. Similarly small portion of the lower ends of the both femus were also destroyed with some part of the greater clavity.

(xi) Pelvis found intact and attached to the part of spine in which five lumbar and two thoracic (lowermost) vertebral were present. No ribs were found. The sacrum was also intact and attached to the vertebral column. The shape of the pelvis appeared to be of a male person.

In all the bones mentioned above (which are all bones sent to postmortem examination) no cut or fractures seen suggesting to any injury to bones.

In the opinion of the Medical Officer, the cause of death could not be ascertained. Duration of death was also not ascertained. He also proved the postmortem report (Ex.ka.15).

6. The learned Ist Additional Sessions Judge on the basis of his appreciation of the evidence in the case held that the prosecution could not prove its case against Ram Avtar and Darbari under section 302/34 & 201 IPC as such they were acquitted. The learned Ist Additional Session Judge further held that the prosecution had proved its case against the appellant-Lal Bachan beyond reasonable doubt and sentenced him to undergo R.I. for life imprisonment under section 302/34 IPC. In view of conviction and sentence under section 302 IPC no seprate sentence under section 201 IPC was awarded.

7. We have heard learned counsel for the appellant and learned Addl. G.A. and have gone through the judgement under appeal, the evidence and material on record.

8. Now, we have to consider whether the appellant-Lal Bachan was responsible for the homicidal death of the deceased. There was no eye witness of the occurrence. At the outset, it need to be mentioned here that the prosecution case rests upon the circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it would be such as to point out only to the guilt of the accused and the evidence should exclude all other hypothesis except the guilt of the accused. It is often said that through witnesses may lie, circumstances will not but at the

same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonable exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no interference other than the guilt can be drawn.

9. The Hon'ble Apex Court in Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622) while dealing with circumstantial evidence, has been held that onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence were enumerated as under:-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable

ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision was also relied on and affirmed in the latest decision of the Hon'ble Apex Court in State of Rajasthan Vs. Rajaram 2003 Cri. L.J. p/3901.

10. Keeping in view the above principle of law, we shall consider the circumstances projected by the prosecution against the appellant. The prosecution has adduced the evidence of extra judicial confession made by the appellant-Lal Bachan before Ravindra Nath Ojha (PW-2) and accepting his evidence the trial court convicted the appellant. Ravindra Nath Ojha (PW-2), who was the Pradhan of village Baghwala had stated that the appellant Lal Bachan came to his house at about 9:00PM and stated that he had committed the murder of Raghubans Pandey (deceased) 30-35days ago and asked for his help to save him. The witness claimed to have reported the matter at P.S. Rudrapur. During the cross-examination, he stated that he was not closely acquainted with the appellant who came to his house only once or twice in the past. It is very significant to note that the appellant told Ravindra Nath Ojha about the murder of the deceased so as to save himself by taking his assistance instead of going to surrender before the police. The appellant had no occasion to go to the house of this witness as there is no evidence on record that the police was behind the appellant to apprehend him. It has been held by the Hon'ble Apex Court in Surinder Kumar Vs. State of Punjab 1999(38) ACC p/36:-

"Having carefully gone through the entire evidence on record, we are unable to hold that the prosecution has been able to conclusively prove the charge levelled against the appellant. Coming first to the extra judicial confession, we find that the evidence of PW6, who only testified about it, is improbable and lacking in credence. It does not stand to reason-rather it seems odd that all the four accused persons

Should be seized at the same time by a mood to approach PW6 to make a joint confession. It is significant to note that they had no particular relationship or connection with PW6, so as to confide in him and take his assistance for surrendering before the police. If really, they wanted to surrender- as is the evidence of PW6 – we fail to understand why instead of going to the Police they would approach him and blurt out a confession before him."

11. It has been further held in Sandeep Vs. State of Haryana (SC) 2001 (42) ACC p/736:-

"In our view, submission of learned counsel for the appellants that the courts below erred in relying upon the confessional statement made by Sandeep before PW9 Laxmi Narain requires to be accepted. Alleged confessional statement narrated by the witness PW9 is limited to the extent that Sandeep, Vikram and Aman came to his house at 9:30 am on 18th March, 1995. Sandeep told him that on 15th March, they committed the murder of Vishal Goel and his dead body was thrown in Gurgaon canal near by-pass sectors 9 and 13. They also informed him that they were afraid of the police and requested him to produce them before the police. It is his say that when he was going alongwith the accused to inform the police, police met him at T-point of Sector 8 and 9, Faridabad and accused were handed over to the police. From the aforesaid version of the witness it is apparent that neither Vikram nor Aman made any confessional statement. Hence, it is difficult to arrive at the confessional that Vikram and Aman made any confessional statement. Only Sandeep told the witness that they have committed the murder of Vishal Goel. Further, the learned counsel is right in submitting that there was no necessity for Sandeep and other accused to go to the residence of Laxmi Narain, more so when Laxmi Narain was not closely

acquainted with the accused nor was having any status in the society so that he could be helpful to them. On this aspect, prosecution has not brought anything on record to point out the reason as to why Sandeep and others had gone the house of PW9. In cross examination, witness stated that he was a member of Lions Club and that Vikram had visited his house 2-3 times and last time 2-1/2 months prior to the date of occurrence. He has also stated that he knew Sandeep prior to vist to his residence. It is his say that he met him in a restaurant and both of them took snacks and he made payment. Considering the entire evidence of this witness, in our view, the prosecution has not brought on record any reason for the accused to go to the residence of Laxmi Narain to confess their crime. Therefore the said confessional statements cannot be relied upon."

Thus the evidence of extra judicial confession does not inspire confidence.

12. The other circumstance relied upon by the prosecution to prove the guilt of the appellant is the recovery of dead body (skeleton), pieces of Chadar, pieces of Dhoti, Tabij and Chappal etc. Section 27 of the Indian Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence. The following are the requirements or conditions for application of Section 27 of the Indian Evidence Act:-

(i) The fact must have been discovered in consequence of the information received from the accused.

(ii) The person giving the information must be accused of an offence.

(iii) He must be in custody of a police officer.

(iv) Only that portion of the information, which relates strictly to discover can be proved. The rest is irrelevant.

(v) The discovery of fact must relate to the commission of some crime.

(vi) Before the statement is proved somebody must depose that some article were discovered in consequence of the information received from the accused.

13. Keeping the above principle, we have examined the evidence relating to the recovery of the said articles on disclosure statement made by the appellant. It was found in an open place which was easily accessible to all and sundry. Ravindra Nath Ojha (PW-2) had categorically stated that the other articles were also recovered from the field of sugarcane and the other articles were also recovered from that place. Thus the place where the recovery was made was an open and easily accessible place. Ravindra Nath Ojha (PW-2) further stated that on 18.10.1986 at about 10:00AM S.H.O. alongwith appellant-Lal Bachan, Ram Avtar, Mithoo (dead) and Darbari reached that place and on the pointing of these four the dead body (skeleton) was recovered. Thus, as per the statement of the witness the recovery was made on pointing of the said persons jointly but the co-accused Ram Avtar and Darbari were acquitted. Mithoo had died earlier. Therefore, it cannot be said to be just and proper for holding the appellant guilty on the basis of same evidence.

14. It has been held in Abdul Sattar Vs. Union Territory, Chandigarh 1986 Cri. L.J. 1986 p/1073:-

> "*Recovery is said to have been made more than three weeks after the occurrence. Admittedly, the place from where these two things are said to have been recovered was a public place and appears to have been very much accessible to people of the locality. It is difficult to believe that these two had been so concealed that they were not noticed and were available to be collected from the very place such a long time after.*"

15. Apart from this, the S.I. Sri S.P. Singh (PW-5) I.O. has stated that he arrested the appellant including other accused on 18.10.1986 at about 7AM. The prosecution has not produced any arrest memo before the court and there is no disclosure statement recorded by the I.O. The I.O. has only prepared the recovery memo. The disclosure statement as indicated in the recovery memo is therefore not sufficient and reliable. The I.O. should have first recorded the disclosure statement on the basis of which he should have proceeded towards the place of recovery. Ravindra Nath Ojha (PW-2) had stated that the appellant made the extra judicial confession before him on 17.10.1986 and at about 8AM on 18.10.1986 he met S.I. Sri S.P. Singh (PW-5) whereas the police had already arrested the appellant and other three at 7AM on 18.10.1986. Perusal of Ex.ka.1 reveal that there are only three public witnesses and no other police personnel was there at the time of the recovery. When S.I. Sri S.P. Singh (PW-5) recorded the 'Amad' in the police station there was no mention of any other police official alongwith him. This fact itself create a doubt that the four accused persons were taken by the S.I. himself alone and on their pointing the recoveries were made. This fact totally belie the prosecution version and make out a strong probability that all the documents prepared after due deliberation, to make out a case against the culprits.

16. In view of the above discussions, we are of the view that there was no direct evidence on record to establish the guilt against the appellant. The prosecution could not prove the extra judicial confession of the appellant made to the prosecution witness to commit the murder of the deceased. There was no direct or circumstantial evidence to prove the guilt against the appellant. The learned Judge erred in holding that the prosecution had established the guilt against the appellant beyond reasonable doubt. Therefore, the appellant deserve to be acquitted of the charges levelled against him. Under these circumstances, the impugned judgement and order dated 30.1.1990 cannot be sustained.

17. The appeal is allowed. Conviction and sentence awarded to the appellant per judgment dated 30.1.1990 passed by Ist Additional Sessions

Judge, Nainital are set-aside. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged.

(J. C. S. Rawat, J.) **(Irshad Hussain, J.)**

Dated 31.7.2004

(LSR)